

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

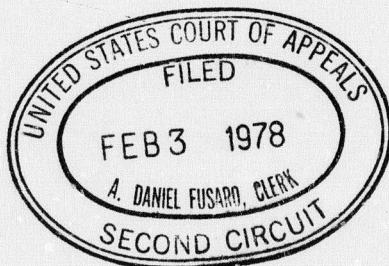
-against-

MARC RAUCH, SOL RAUCH and
LAWRENCE CORSA,

Appellants.

BRIEF FOR APPELLANT MARC RAUCH

Appeal From a Judgment of
Conviction In The United
States District Court For
The Eastern District of
New York



DONALD E. NAWI, ESQ.
29 Iselin Drive
New Rochelle, New York 10804
Attorney for Appellant
Marc Rauch

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED FOR REVIEW	3
STATEMENT OF THE CASE	4
The White Brochure; Paul Lipton	4
Lipton's Departure	7
Problems in the Business; the SEC Proceeding	8
Indictment; Information; Marc's Motion to Suppress.	9
The Trial	11
ARGUMENT	18
POINT I - AN INTEREST CONFLICT ARISING WHEN HIS ATTORNEY ASSISTED HIS FATHER'S DEFENSE AND HIS FATHER ACTED FOR HIM VIOLATED MARC'S SIXTH AMENDMENT RIGHTS	18
POINT II- THE DISTRICT COURT'S FAILURE TO DESIGNATE REGULAR AND ALTERNATE JURORS AS SUCH UNTIL THE END OF THE TRIAL VIOLATED RULE 24	27
POINT III- MARC RAUCH WAS DEPRIVED OF A FAIR TRIAL, INCLUDING BY IMPROPRIETIES IN THE CHARGE, EVIDENTIARY RULINGS, AND THE DISTRICT COURT'S HANDLING OF HIS EXAMINATION OF THE GOVERNMENT'S EXPERT	31
CONCLUSION	37

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
Abraham v. United States, 549 F.2d 236 (2d Cir. 1977)	18, 19
Bruton v. United States, 391 U.S. 123 (1968)	33
Faretta v. California, 422 U.S. 806 (1976)	25
Glasser v. United States, 315 U.S. 60 (1942)	19
Mares v. United States, 383 F.2d 1805	30
Marshall v. United States, 360 U.S. 310 (1959)	30
Mone v. Robinson, 430 F.Supp. 481 (D. Conn. 1977)	19, 25
Morgan v. United States, 396 F.2d 110 (2d Cir. 1968)	18, 19
Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976)	18
United States v. Alberti, 470 F.2d 878 (2d Cir. 1972)	18
United States v. Banks, 383 F.Supp. 389 (D.S. Dakota 1974)	29
United States v. Beasley, 464 F.2d 468 (10th Cir. 1972)	30
United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976)	18
United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976)	3, 18, 19, 26
United States v. Calabro, 467 F.2d 973 (2d Cir. 1972)	24
United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971)	35
United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973)	18, 19
United States v. Glasser, 443 F.2d 994 (2d Cir. 1971)	36

TABLE OF AUTHORITIES (CONTD.)

Cases

	<u>Page</u>
United States v. Hayutin, 398 F.2d 944 (2d Cir. 1970)	18
United States v. Lovano, 420 F.2d 769 (2d Cir. 1970)	18
United States v. Mari, 521 F.2d 117 (2d Cir. 1975)	18
United States v. Nash, 414 F.2d 234 (2d Cir. 1969)	30
United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973)	35
United States v. Sacco, 563 F.2d 552 (2d Cir. 1977)	3, 24, 25, 34
United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1971)	36
United States v. Sposato, 446 F.2d 779 (2d Cir. 1971)	36
United States v. Tolliver, 2d Cir. Jan. 3, 1978	18
United States v. Virginia Erection Corp., 335 F. 2d 868 (4th Cir. 1964)	30

Other

18 U.S.C. 1341-42	18
F.R.Crim.P. 24	3, 27, 29
F.R.Crim.P. 11(d)	36
F.R.Evid. 403	32
F.R.Evid. 701-06	33
F.R. Evid. 802	33
F.R. Civ. P. 47(b)	27

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-v- : Docket No. 77-1311
MARC RAUCH, SOL RAUCH and :
LAWRENCE CORSA, :
Appellants. :
-----X

BRIEF FOR APPELLANT MARC RAUCH

Marc Rauch appeals from his July 7, 1977 conviction in the United States District Court for the Eastern District of New York (Pratt, J.), following an adverse jury verdict on fourteen counts of mail fraud. 18 U.S.C. 1341-42. The confinement part of his three year sentence is six months and he must also pay a \$2,800 fine.* He remains free pending appeal. Counsel is assigned under the C.J.A.

Convicted with him were his father Sol Rauch and his sister's husband Lawrence Corsa. Corsa's sentence was identical to Marc's. Sol Rauch, on the other hand, received a prison term of three years and a \$14,000 fine. Corsa and Sol Rauch are

* Two hundred dollars on each of fourteen counts. The three years (six months confinement) was for each count concurrently.

co-parties to this appeal.

The case concerns Federal Coin Reserve, Inc., which sold coins for about a year and a half through the mails to investors, mainly doctors and dentists, until the SEC obtained an injunction in December 1974 because it had not registered. Sol Rauch was Federal Coin's attorney. Marc Rauch and Corsa, both then only twenty one, were brought in to run the company some months after it began, after its format, design, and method of operation had been planned and put into effect by others. Federal Coin's mail fraud problems arose because rather than exactly describe the nature of its operations, its promotion (mainly that of the founders) puffed the company up to more than it was, and it was less than exact in its dealings with complaining customers, to some of whom it was indebted when the SEC brought suit. Those problems heightened when the Rauches and Corsa tackled the Grand Jury represented by Rauch Sr., an attorney but certainly not a criminal or securities lawyer; and then tackled the trial with Sol Rauch ostensibly representing only himself but also acting for his son and Corsa, and their lawyer often functioning not only as their counsel but Sol's as well. Notwithstanding, all of the Government's proof was circumstantial and that, and the combined facts of their age, that they had inherited, not created the basic promotional problems, and that they ran a functioning company rather than a

shell, made the trial questions as to them extremely close.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in failing to protect Marc from a conflict of interest in his representation at trial and consequent deprivation of his Sixth Amendment rights. See, among a long line of this Court's decisions on the point, United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976). The issue came up because notwithstanding an interest conflict between Marc and his father, his attorney also acted for his father in fact, if not in form, and his father became an advocate for Marc, compounding the difficulties already posed by pro se representation of a co-defendant which this Court addressed in United States v. Sacco, 563 F.2d 552 (2d Cir. 1977).

2. Whether the district court erred in selecting fourteen jurors as a group, without differentiation between regulars and alternates until the end of the trial, as a result of which the parties ultimately lost a juror they both wanted, and another juror remained on the panel although she seemed to have already decided in the Government's favor. This method of jury selection poses issues under F.R.Crim.P. 24(c).

3. Whether the district court deprived Marc of a fair trial by improprieties in its charge, its evidentiary rulings, and its handling of Marc's cross-examination of the Government's expert.

STATEMENT OF THE CASE

The White Brochure; Paul Lipton

Harold Rauch is Marc Rauch's uncle. He is one of the principals of Hartford Chemical Company, 277 Northern Boulevard, Great Neck (1084). Hartford sells industrial chemicals mainly through telephone solications (2137).

By early 1973, Hartford had two offshoots located in the same building. One was Brigadoon Scotch Distributors Ltd. which since the sixties sold interests in scotch. Brigadoon was the subject of SEC proceedings, had financial problems and ultimately went out of business (2142).

A second was Federal Coin Reserve Co. Originally the brainchild of Herman Weinstock, who ran Brigadoon, and his associate Paul Lipton (2105), Federal Coin's business was basically buying and selling rare coins. Its primary market, however, was not collectors, but doctors, dentists, businessmen, and others looking for investment in something besides stocks and bonds. It functioned somewhat like a mutual fund for coins. For amounts normally running from \$500 to \$5,000 (48), the investor would receive a portfolio of coins selected by Federal Coin. Theoretically the coins would be worth at least what the investor paid, and hopefully they would increase in value as time went on.

It was Lipton who got the business going in or about July 1973 (2106, 2344), clearly on the wrong foot. First, he adopted a logo which came dangerously close to the federal seal

which, when coupled with the Federal and Reserve portions of Federal Coin's name could give the impression of an official federal connection (47, 411, 2378). Second, he underestimated the SEC's interest in a business which, it was true, was only selling coins, but which was attracting purchasers on an investment theory, thus inviting the SEC lawsuit which later came to enjoin Federal Coin's offerings without an SEC registration. Third, he prepared an elaborate brochure with a white cover (47, 2134-86, 2346) (hence called at trial "the White Brochure"), which, according to the later indictment (A 5)* contained the following fraudulent statements**:

(1) That Federal Coin was a large, established company, which had been in business for many years;

(2) That Federal Coin because of its large size and reserve funds available and an inventory of coins, could sell coins at prices lower than other companies;

(3) That Federal Coin would repurchase customers' coins for at least the price paid. This referred to a statement on the brochure's last page that Federal Coin guaranteed the repurchase of the entire portfolio for at least the initial purchase price provided the coins were in the same condition and accompanied by certain certificates the purchaser originally received from Federal Coin;

* The Appendix to Sol Rauch's Brief contains the docket entries, information, charge, certain district court opinions, and other material. "A" denotes that Appendix.

** Although the White Brochure was the focus of these allegations, the Government claimed salesmen's representations in some of these regards as well (e.g. 111, 230-31, 536, 583, 606-07).

(4) That coins purchased from Federal Coin were priced at their current market value;

(5) That customers would be individually assigned an Investment-Numismatist Account Executive who was a member of the American Numismatic Association;

(6) That coin portfolios were assembled by Federal Coin's numismatic experts and were guaranteed as to their authenticity and grade;

(7) That Federal Coin received investment expertise and coin portfolio selection expertise from the "Hartford Investment Group", investment consultant experts;

(8) That customers would receive their coins within four to six weeks from the date of purchase; and

(9) That Federal Coin would provide its customers with semi-annual accounting statements of their investments.

According to the Government, at the time Lipton prepared the White Brochure, Federal Coin was not an old or large or established company; it had no facilities or ability to sell coins at prices below other companies; it was not prepared to honor the unconditional repurchase guarantee; it sold coins which were worth far less than purchasers paid; it hired account executives who were not members of the American Numismatic Association and in any event membership there meant nothing since it was not a professional coin Society; it had no experts to assemble the portfolios; it implied that Hartford Investment Group was a separate company connected with Hartford Insurance

Company when it was merely another name for Federal Coin, derived from Harold Rauch's Hartford Chemical Company; it was not in a position to give four to six week deliveries and it had no intention of providing its customers with semi-annual accounting statements or other expert financial advice.

Lipton's Departure

In late 1973 Herman Weinstein resigned from Hartford (2108). His death a few months later (2106) left a mess in Brigadoon, to which Sol Rauch succeeded (2296). Lipton resigned as well (2108), leaving Federal Coin without anyone to run its day to day affairs. For that Harold Rauch turned to Sol's son Marc and his son in law Larry Corsa, both then twenty-one (2108-09).* Corsa had collected coins since he was a boy (3213) and Marc also (2486) and together they had sold coins and jewelry in Florida (2486). In the next months, among other things, (a) Federal Coin made arrangements to purchase coins on a regular basis from Mark Singer who ran a substantial Long Island coin operation (2492) and from others later on. It also reached agreement with a Long Island bank to have its coins recognized as an investment for Keogh plans (2116); (b) it hired Al Cito as a full time office manager, supervising several clerical people in the office (396), Marvin Gordon, father of a high school classmate of Marc, as a full time salesman (2729-30), and Kenneth Kramer, a certified public accountant to handle any accounting problems (2196)

* Marc and Corsa eventually came to own Federal Coin.

(c) it placed ads in medical and dental journals and airline brochures (2350), displayed at medical and dental conventions (2121), and hired commission salesmen to call prospective leads at night using the free WATS lines of Hartford Chemical (2082, 2120); and (d) it made extensive revisions in Lipton's White Brochure now issued under a blue cover ("the Blue Brochure") and in other of its promotional materials. There is no question but that Federal Coin, as run by Marc and Corsa, was until the roof caved in a year later a functioning business, buying coins of value from legitimate, recognized sources of supply, and with certain exceptions to be discussed later, sending those coins to people who ordered from it.

Problems in the Business; the SEC Proceeding

By the fall of 1974, Federal Coin was doing poorly (423-24), was short of money (2115), and had to fire employees to pare expenses (425). On December 12, 1974 the SEC commenced action against it in the Southern District for violating the 1933 and 1934 Securities Acts (2982). That followed complaints, the inevitable result of its economic problems, that Federal Coin was not honoring its guarantees, was not making refunds when demanded, was not delivering coins by the time promised, was not giving the value promised, and so on. The Commission secured first a temporary restraining order and later a preliminary injunction from Judge Lasker, banning Federal Coin from doing business without registering (2434-35, 2470), on the ground that Federal Coin was offering not just coins, but an investment contract,

a "security", and that security had not been registered.*
The SEC requested but was not granted a receiver. 388 F.Supp.
1288 at 1293.

The SEC action brought Federal Coin's business to a standstill. Between the hearings, the temporary and then preliminary bans on its earlier manner of doing business, and subpoenas to produce documents, there was little it could do in attracting new business and even bringing a satisfactory conclusion to its old (3100-01). Still in the offing was a trial on the SEC's request to make the preliminary injunction permanent when under threat that there would be a criminal proceeding unless it folded, or so Marc Rauch testified, Federal Coin agreed to a receiver's appointment to wind up its business (2561).

Indictment; Information; Marc's Motion to Suppress

The criminal proceeding came nonetheless as a grand jury began to inquire into charges that Federal Coin, and particularly Marc Rauch, Sol Rauch and Lawrence Corsa were guilty of mail fraud and Securities Act violations. Sol Rauch represented all three before the grand jury. His position with respect to Federal Coin was that he had been only an attorney, that he had had nothing whatsoever to do with the company's affairs (or almost nothing), and that all aspects had been run first by Weinstein and Lipton, and later Marc and Larry. At his instance

* Judge Lasker's decision is reported at 388 F.Supp. 1288 (S.D.N.Y. 1975). He did not address the fraud issues.

all three testified (2738 , Marc on February 20, 1976, the other two a few weeks later.

In April 1976 the grand jury returned a fifteen count indictment against the three and Marvin Gordon, the Federal Coin salesman (A 6) who assertedly made misrepresentations about the company in a telephone call with a postal inspector. Counts One through Ten charged mail fraud, each involving a separate customer who complained of no coin delivery, late refund, and so forth, except for Count Three which charged the postal inspector's phone call with Gordon (A 9). Counts Eleven through Fifteen maintained the separate customer format for five other purchasers but charged instead violations of the 1934 Securities Exchange Act (A 12). The counts all came against a general statement of a scheme to defraud which set forth the alleged misrepresentations in the White Brochure (A 11).

Prior to trial Marc moved to dismiss the indictment on the ground that he did not understand he was to testify on February 20, 1976, accordingly was unprepared, and went before the grand jury only because the Assistant said the appearance was to present documents, and promised a further appearance later on. That promise was not kept. The district court held a hearing at which Marc, his father, Corsa, Marc's sister and his uncle Harold all testified to the broken promise. The Assistant denied its existence. The district court denied the motion (A 20). Marc had previously wanted to appear before the grand jury, and he could not complain of the broken promise since "it is not the target who determines the scope of the inquiry [but] the grand

jury itself, assisted by the prosecutor" (A 23). In addition, the court urged and the Assistant agreed to take out of the case issues in which the jury would have to determine whether Federal Coin offered coins or "securities". The Assistant, however, wanted the particular customers charged in the securities counts to remain as separate indictment counts. The court then suggested and ultimately the defendants agreed to waive indictment so that the Government could accomplish its purpose simply by information. Tr. March 1, 1977, pp. 20-21.

The Trial

Trial began on March 14, 1977 and extended to April 8.* Sol Rauch continued to represent himself at trial (14) just as he had represented Marc, Corsa and himself before the grand jury. Their trial defense on the other hand was handled by Samuel Goldman, Esq., who came to them through Sol Rauch.

We can group the Government's case into the following parts:

(1) Thirteen witnesses who ordered coins from Federal Coin and were disappointed in one manner or other. The vast majority were doctors or dentists. In some cases coins were ordered but not received when expected (e.g. 114, 239). In others Federal Coin argued about a refund the customer demanded, usually because he felt the coins were worth less than represented (e.g. 54, 130, 171). In a few others the purchaser failed to receive any coins or refund at all (322, 617, 699). Most were

* Gordon was severed before trial. Eventually the Government dismissed the charges against him.

doubly unhappy because they tried to reach Federal Coin to get action on their problems and felt they were getting a run-around (e.g. 56-59, 114-118, 172-173, 239, 323-24, 362, 616). In the vast bulk of the cases, however, the problems only assumed major proportions after the SEC injunction closed Federal Coin's operations (e.g. 136, 193, 260-61, 324-25, 330, 370-71, 557, 621).

Three issues arose with respect to the testimony of these customers. First, several customers received opinions from others, usually coin dealers, that their coins were worth less than Federal Coin said. The district court vacillated on the issue, but ultimately permitted several such opinions with instructions that the jury consider the opinions only for their effect on the customer's state of mind when he complained (e.g. 163, 249).

Second, the Government wanted to elicit from the witnesses that they had received misleading impressions from the Federal Coin promotions, for example that Federal Coin was an old and established company. The district court permitted that on the ground that "the jury is entitled to know what the subjective reaction of these particular individuals was to what it was that was transpiring between them and the Company" (68-69), provided the Government brought out the specific elements upon which the impression was formed (70). Impressions of numerous doctors were

then in evidence before the jury (e.g. 153, 236, 535).

Third, the Government rested on this aspect with the testimony of thirteen witnesses who were the subjects of thirteen counts. During defendants' case the Assistant asked Marc about certain others who had also sent in money and not received coins (3076-86). When he stated that he had no knowledge of their problems (3076), the Assistant brought in two of them on rebuttal to state them (3256, 3351). The court permitted the testimony as similar acts and as bearing on Marc's credibility (2350-51) and so charged the jury (3262-63).

(2) Teresa Gisske, a postal inspector, who called Federal Coin on the pretext of investing in it and talked for close to an hour with Marvin Gordon about the company (964-65). She testified that Gordon claimed among other things that he had six coin experts working under him (966) and implied that the Hartford Investment Group mentioned in the brochure was connected with the Hartford Insurance Company (972).

(3) Al Cito, Federal Coin's office manager for most of 1974. Cito, a retired Port Authority policeman, came to Federal Coin with impeccable credentials (395) and unquestionably was honest. Most of the customer complaints reached him at one time or another (407). He was disturbed that customers were not getting better service and complained both orally and in a written memorandum to the Rauches and Corsa (413-16). He stated further that he had not seen any Federal Coin accountants or investment experts, had not sent out accounting statements

and had not been aware of anything called the Hartford Investment Group (432-35). He identified letters sent to customers (some indeed enclosing refunds) under his name after he was no longer with the company (426-27).

He also told, however, of specific Federal Coin office procedures (465) designed to see that orders and inquiries were followed up; of Federal Coin's purchasing coins (483-85, 905), attending auctions (913), attending conventions to exhibit thousands of dollars worth of coins (904), delivering coins to customers and making refunds; and of Federal Coin's other activities (405-06, 429-30) demonstrating a bona fide business. He stated, indeed, that in his view, in spite of all their problems Marc and Corsa had been honest, had made genuine attempts to improve the situation (418), and had not been out to defraud anyone (467, 914) even with respect to continued use of some of the problem language about the company in the White Brochure (412).

(4) Harvey Stack, a prominent Manhattan Coin dealer, as an expert on the coin aspects of the case. He had appraised the coins of several of the Government's witnesses and stated his opinion that those coins were worth less than Federal Coin claimed (e.g. 1486-1503). He stated further that in two of the coin portfolios the selections were not well suited for coin investment (1507-08), and that a number of statements about coins in the Federal Coin brochures were wrong (1511-28). Marc, rather than his attorney Goldman, did most of the cross-examining. Goldman stated that Marc was more expert about coins and could do a better job (1531).

(5) Martin Siegal, the receiver appointed in November 1975 under Judge Lasker's final consent order (3289), produced in rebuttal to the contention that Federal Coin had voluntarily turned over its records. He told of difficulties on that and how he ultimately had to return to Judge Lasker for an order to get them (3291-95).

That basically was the Government's case, supplemented by an attempt to tie Sol Rauch into policy decisions at Federal Coin through testimony we recount in the footnote.* Defendants' case was substantial. Sol Rauch testified at length, denied any

* One customer spoke on the telephone with Rauch, as Federal Coin's attorney, about her failure to receive the coins she ordered. Another spoke with him at the Southern District Courthouse about the same thing. Cito said that Rauch was present at meetings where Federal Coin business was discussed, and a travel agent said Rauch attended a convention for Federal Coin and insisted on approving all Federal Coin travel arrangements. Rauch admitted he arranged loans for the company. After reviewing this testimony and finding it "a close question", the district court denied Rauch's motion to dismiss for insufficiency at the close of the Government's case (2026-27). It apparently rejected as worthless a Government compilation showing that Rauch received about \$17,000 in payments (said to be salary), because the compilations omitted reference to items Rauch had paid into the company for which the payments were probably reimbursement (1996, 2018). The district court also denied Rauch's insufficiency motion at the close of the entire case, finding that material had come out during defendants' case which drew him even closer to the events.

Rauch contends on appeal, and we agree, that the district court should have granted his motion to dismiss at the close of the Government's case. If that had happened the final jury result as to Marc might have been different.

involvement in Federal Coin's operations except giving general advise from time to time from father to son and helping to get loans for operating capital, and emphatically denied any attempt to defraud anyone (2230). As part of his cross-examination the assistant was permitted to probe his connection to Brigadoon (2287-98), although under instructions to the jury that the issue did not concern Marc and Corsa (2289). Marc also testified, showed the extensive bonafide operation carried on, including through many documents, explained why the complaining Government customers had not been satisfied (e.g. 2365-2893), and demonstrated that there could be legitimate controversy over coin value, with his customers receiving real value notwithstanding their complaints or Stack's contrary opinion (2712, 2916-17, 2928-29). With the aid of his grand jury testimony the Assistant cross-examined him about revisions he and Corsa made in the blue brochure, particularly why some things were left in and other taken out (3033-70) and about whether the company made refunds to customers after the SEC injunction (3076-3158). Other members of the Rauch family -- Harold (2103), Corsa's wife (2152), Marc's wife (2030), one sister (2054), her fiancée (2037) -- also substantiated the picture of a genuine operation, as did witnesses who had dealt with or worked for the company, and Corsa in brief testimony (3208-3220). They showed that salesmen

had been policed, that ones such as Gordon who made unauthorized representations had been fired (2072-73), and that the SEC's closing of the business in December 1974 (2035) had exacerbated their problems. Finally, defendants had testimony from Mark Singer, a Long Island coin dealer (2585) from whom Federal Coin bought large amounts of coins (2606, 2628).

Following several days of deliberation and a request for a supplemental charge on intent (3679) not given when asked (3686) and later rescinded (3693), the jury, selected in a manner which we address in Point II of the Argument, returned a verdict against the three defendants of guilty on fourteen counts (3694-97).*

* One count was dismissed at the close of the Government's case when the Government did not produce the customer involved in it.

ARGUMENT

POINT I

AN INTEREST CONFLICT ARISING WHEN HIS ATTORNEY ASSISTED HIS FATHER'S DEFENSE AND HIS FATHER ACTED FOR HIM VIOLATED MARC'S SIXTH AMENDMENT RIGHTS

In our system a party is usually stuck with the errors of his attorney, although a breakthrough on that question may be in the offing. Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976); United States v. Tolliver, 2d Cir. Jan. 3, 1978. That presupposes, however, an attorney with undivided loyalty. This Court has made clear that "representation free from conflicting interests is an essential part of the Sixth Amendment right to the effective assistance of counsel", United States v. Bernstein, 533 F.2d 775, 787-88 (2d Cir. 1975); has required the trial court "to take command of the situation" through hearing, inquiry and appropriate direction as to representation when the possibility of a conflict arises, Ibid; and has reversed where either a real conflict, or specific prejudice has been shown. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); Abraham v. United States, 549 F.2d 236 (2d Cir. 1977); United States v. Mari, 521 F.2d 117 (2d Cir. 1975)*; United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973); United States v. Lovano, 420 F.2d 769 (2d Cir. 1970); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972); Morgan v. United States,

* In which Judge Oakes suggested that the required showing of prejudice or a real conflict "may have to [be] re-examined", 526 F.2d at 119.

396 F.2d 110 (2d Cir. 1968). See also Glasser v. United States, 315 U.S. 60 (1942); Mone v. Robinson, 430 F. Supp. 481 (D. Conn. 1977).

There was a glaring conflict of interest below. It resulted in specific prejudice to Marc Rauch, and denied him his Sixth Amendment rights. In saying that we do not imply fault either with Sol Rauch, who was deeply emotionally involved and thought he could help his son, or with Goldman, who came into a strong family situation and dealt with it as best he could.* Our criticism rather is with the trial court, which was required to be sensitive to these issues, Abraham v. United States, 549 F.2d at 239, United States v. Carrigan, 543 F.2d at 1055, but which took no steps to explore the threat to Marc's Sixth Amendment rights occurring in plain view.

Analysis of the problem begins with the fact that the most important defendant, as later borne out by Judge Pratt's three year sentence, was not Marc or Corsa, who ran Federal Coin, but Sol Rauch, who didn't.** It is enough to note that when the

* The frequency of this Court's conflict of interest decisions demonstrates that counsel often is not in a position to appreciate the potential significance of the conflict. See also Lumbard, J., concurring, United States v. Carrigan, 543 F.2d at 1058.

** Since the trial court made no inquiry whatsoever, the burden of proof on the prejudice issue is on the Government. United States v. DeBerry, 487 F.2d at 453 n. 6; United States v. Carrigan, 543 F.2d at 1056. We nonetheless address it here.

Federal Coin investigation started, he had previously been indicted for fraud in Canada and convicted in the trial court, although an appellate court later reversed (3240-41); that he had been arrested in 1972 in Florida and charged with illegal gold dealings (charges later dismissed) (3242-43); and that he had been thoroughly investigated in the Brigadoon matter which, although it never resulted in criminal charges supposedly because of statute of limitations problems, carried implications of wrongdoing merely because of the investigation (Tr. July 7, 1977, pp. 14-16). The very existence of this past history meant that he probably had the most to lose from a conviction. And that, coupled with the fact that he was an attorney who had run for Brooklyn Borough President, Supreme Court Justice and Civil Court Judge (Id., pp. 4-5), a business man of lengthy experience (once a bank president Id., p. 9), and most importantly Marc's father, made it inevitable that he would dominate the defense effort. That meant for all the defendants -- a point apparent enough from the fact that he acted as attorney for Marc and Corsa in their appearances before the grand jury, and decided that Marc and Larry would testify although Goldman

their attorney wanted it otherwise (2232-35).*

Yet the conflict of interest between Mark and his father could not have been more complete. Since the fundamental problems at Federal Coin antedated Marc's arrival in the company, one potential strategy was to face up to those problems, show that their origins lay with Lipton, and argue that the failure to realize their scope and correct them may have been stupid, but not criminal (which indeed accurately describes what happened). A candid argument such as this from a twenty one year old, where youth and lack of sophistication were clearly extenuating factors, might have succeeded. The difficulty, however, was that Sol Rauch's connection with Hartford, and therefore, tangentially with Federal Coin, antedated Marc's arrival (2125, 2130-33). Thus, the more Marc faced up to what Lipton did, the more he caused possible problems for his father.

* See also Hearing, Feb. 10, 1977, p. 29:

"Q Now, were you acting as a legal adviser to your son and son-in-law on both February 20th and March the 5th; is that correct? Well, did they look to you for advice?

A Yes.

Q Isn't that so?

A Correct. Incidentally, I stated to them your advice to me to them and they advised me --

Q My advice originally was for you not to testify before the Grand Jury?

A Right."

The later period posed the same issue. Sol Rauch insisted that he had nothing to do with Federal Coin except act as attorney (2184) and obtain financing (2181-83), and that everything was run by Marc and Larry. They did not challenge that. They could well have argued, however, using no more than the Government's proof of Sol's activities, that if there was a misrepresentation problem, it was a broad policy issue about which the twenty one year olds who were out buying coins, shipping them to purchasers, attending medical conventions, and so on did not have to worry as long as a fifty four year old attorney and businessman was around.*

What was already a bad situation became worse yet when Sol Rauch decided to represent himself at trial, making Goldman the only experienced trial practitioner. The net result was that Marc's defense was now directed on the one hand by his father, who no matter how innocent and well motivated toward his son obviously had conflicting interests, and on the other hand by Goldman, who as the only experienced practitioner, found himself more and more defending the pro se father, so that in fact, if not in form, he was Sol Rauch's attorney as well. This started as early as the pretrial hearings (e.g. Tr. Feb. 10, 1977, pp. 53-55) and continued overwhelmingly at the trial.

* We do not suggest this as an argument which had to be made. We suggest it as an argument which had to be explored.

Focusing first on Goldman, we find the bulk of his opening devoted to the contention that Sol Rauch was innocent, that he signed no checks or letters, and handled no matters except for one or two complaints, that he received only \$11,000 in legal fees compared to Marc's salary of \$14,000, and that if convicted he would be disbarred and ruined for life (33-38). We find Goldman attempting to establish that Government witnesses (e.g. 186-87, 237-38, 254, 371-73, 562) and some of his own (2069, 2125, 2239-42, 2387) had no dealings with Sol Rauch. And we find extensive cross-examination, openly on behalf of Sol Rauch (1201-07), of Nagelberg, who said Sol Rauch insisted on approving all the Federal Coin travel bills (1195), although Nagelberg said nothing to harm Marc, and of Al Cito, who placed Sol at the center of certain policy meetings (421-24), including the final word on the blue brochure (412). That testimony dovetailed perfectly with the available argument that the twenty-one year Marc was not sufficiently aware of these matters to have intended fraud. Goldman, however, vigorously challenged this testimony, examining over several pages (460-65, 923-24) to establish that everything emanated from Marc and Corsa and that they not Sol, made the decision on the brochure (464-65). Goldman brought out at the same time that his clients, not Sol, handled the doctors' complaints

about which the Government was making so much (480-81).*

Goldman's understandable attempt to aid Sol Rauch was but the opposite side of Sol Rauch's constant interjection of himself on behalf of Marc and Corsa, as witness and as attorney (e.g. 43-44, 103-05). This Court only recently reiterated the magnitude of the potential prejudice to one defendant when another represents himself and laid down guidelines for the district courts to prevent such prejudice. United States v. Sacco, 563 F.2d 552 (2d Cir. 1977). See also United States v. Calabro, 467 F.2d 973 (2d Cir. 1972). This case goes one step beyond Sacco in that the pro se defendant not only represented himself, but spoke for the co-defendants as well. The prejudice was enormous, Sol Rauch candidly admitting at sentencing that "I was terribly emotionally involved in the case, and I should have had an outside attorney [and] I don't think that I received, because of myself primarily, a proper and fair trial" (Tr. July 7, 1977, p. 9), the jury rejecting him as a credible witness, and the court giving him a three year sentence based on the "considerable opportunity [I had] to view Mr. Rauch, since he participated, not only as a witness but as an

* See also Goldman's cross-examination of Gisske; Marc and Corsa, not Sol, "made decisions at Federal Coin Reserve" (1034, 1039).

We don't contend that Sol actually made decisions. Again, we say simply that Marc and Corsa could have explored drawing on the fact that he was around in having the jury assess the extent of their criminal intent.

attorney" (Id., p. 17).

Although Sol Rauch had a right to bring this on himself, Faretta v. California, 422 U.S. 806 (1976), Marc had an equal right to be insulated from its consequences, United States v. Sacco, supra, which were inevitable because both from that and Goldman's acting on Sol's behalf, the jury had to view him and his father as personally and professionally tied together.* The court was obligated, but failed to give him protection. United States v. Sacco, supra.

The remaining question is the proper remedy. Where the trial court has not inquired into the conflict -- thus precluding the notion that defendant waived his Sixth Amendment right, Mone v. Robinson, 430 F.Supp. at 484**-- and

* Not the least of this was the Government's cross-examination of Sol about the SEC injunction against Brigadoon and the \$800,000 in claims against it against millions of dollars of sales (2296-97). Although the testimony was supposed to be used only against Sol, the Government later brought out that Corsa had been paid at one point by Brigadoon (3227). The two companies of course shared office (2303) and were both connected to Hartford Chemical.

** "[B]efore a waiver of the constitutional right to the effective assistance of counsel may be found, there must be some personal inquiry of the defendant directed specifically at the alleged conflict of interest."

either the conflict or prejudice is established, only a retrial will vindicate the right. United States v. Carrigan, 543 F.2d at 1057-58. That course is the only appropriate one here.*

* Corsa's Brief, we understand, will discuss in broader terms the quality of the representation in the trial court, based in addition on counsel's turning over Stack's cross-examination to Marc and his failure to have a prior talk with Singer. We see no need to enter that discussion except to note that if the argument succeeds for Corsa, it succeeds for Marc as well.

POINT II

THE DISTRICT COURT'S FAILURE TO DESIGNATE REGULAR AND ALTERNATE JURORS AS SUCH UNTIL THE END OF THE TRIAL VIOLATED RULE 24

We understand that certain judges in the Eastern District choose a jury panel without specifically designating which jurors are regulars and which alternates. That comes only when the jury retires to deliberate.

The practice was followed here. Fourteen jurors were chosen without specific designation. At the end of the case defendants were to designate one as an alternate and the Government the other. If there were only thirteen, the alternate would be chosen by lot (3422).

The practice, we submit, clearly violated F.R.Crim.P. 24, and that violation had specific adverse consequences for these defendants.* Thus, when the evidence was over the panel had

* Rule 24(c) provides in pertinent part:

The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

The plain command is that regular and alternate jurors are to be designated as such at the outset, and that alternates replace regular jurors "in the order in which they are called."

Rule 47(b) of the Federal Rules of Civil Procedure is to the same effect.

only thirteen jurors, one having been excused earlier. Before summations Juror No. 2 told the court he was scheduled to take his mother to the doctor the next day and had already postponed the appointment twice (3413). The Government really did not want him excused (3414). Neither did defendants (3421). And although the juror was anxious to get the appointment over (3426), he regretted not sitting for the verdict (3428-29) and was prepared, if necessary, to make other arrangements (3426). The court nonetheless excused him. It stated that someone was going to be excused at the alternate juror lottery the next day. Conceivably it might be Juror No. 2. It determined to avoid the lottery by excusing him right then and there (3425-26).

Immediately thereafter, however, with the jury now down to twelve, the court learned that earlier in the trial, when defendants had asked for but been refused a Government concession that Corsa was a coin expert (3223), Juror No. 3 had said: "I wouldn't [concede that] either" (3430). Defendants asked that the juror be excused or at least that inquiry be made (3433-34). They got neither. The court offered to discharge the juror and go forward with eleven if the Government agreed. Barring such agreement it would say nothing until the verdict was in (3437). The Government, however, refused to agree,* nothing

* Although at the outset of the trial the Assistant himself asked that defendants agree to a jury of eleven if that became necessary (4).

was said, either generally or specifically, and Juror No. 3 participated in the deliberations. On inquiry after her guilty verdict, she did not "believe" she said anything about Corsa's qualifications as an expert, and "to [her] mind" maintained an open attitude (3701-02). But something must have happened because her ultimate response was "I'm sorry about that" (3703). And while the court later found that she had not prejudged the evidence nor been biased, it refused to find that she had not made the remark (3705).

We can now draw conclusions about the district court's disregard of Rule 24.

First, had Kaufman, Juror No. 2, been designated a regular, as he should have been, defendants might not have lost him. The impetus to excusing him, as we have said, was the court's notion that someone had to be discharged, this might be Kaufman, so why not let him go. There would undoubtedly have been far more exploration of, and pressure for the "other arrangements" Kaufman was prepared to make, had he been a regular juror.

Second, the unauthorized procedure obliged defendants to go to verdict with Juror No. 3. With Kaufman gone and the jury down to twelve, the Government was in a position to refuse a verdict by eleven, effectively forcing the court to retain a juror who might have already made up her mind in the Government's favor.*

* Compare United States v. Banks, 383 F.Supp. 389, 396-97 (D.S. Dakota 1974) (misconduct for Government to refuse to agree to jury of eleven to force retrial to correct errors in earlier trial).

Moreover, as a direct result of the impasse, the district court deferred until after verdict its inquiry into her remark. Even with wide discretion to inquire generally of the panel or specifically of Juror No. 3, the inquiry had to be made before the jury retired to avoid the problem juror's infecting the entire deliberation. Marshall v. United States, 360 U.S. 310 (1959); Mares v. United States, 383 F.2d 805 (10th Cir. 1967). Finally, once the guilty verdict was returned the juror had a vested interest in protecting it, as shown by her attempt to imply that she had not made the disputed statement but her failure categorically to deny it, and her eventual apology, confirming that indeed she had.

These points are not lost because defendants agreed to the improper jury selection. Rule 24 is mandatory. The district court may not change its provisions even with the parties' consent. United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964); United States v. Allison, 481 F.2d 468 (5th Cir. 1973). And where the rule has been violated, with a demonstrable result on the composition of the panel, there must be reversal no matter how strong the Government's evidence. United States v. Virginia Erection Corp., 335 F.2d at 873; United States v. Beasley, 464 F.2d 468 (10th Cir. 1972); United States v. Hayutin, 398 F.2d 944, 950-51 (2d Cir. 1968); United States v. Nash, 414 F.2d 234 (2d Cir. 1969).

POINT III

MARC RAUCH WAS DEPRIVED OF A FAIR TRIAL, INCLUDING BY IMPROPRIETIES IN THE CHARGE, EVIDENTIARY RULINGS, AND THE DISTRICT COURT'S HANDLING OF HIS EXAMINATION OF THE GOVERNMENT'S EXPERT.

This point brings together the rest of the errors below to demonstrate the extent to which the trial fell short of the standards expected of the districts in this Circuit. Before doing that, we should remark that some of the errors might be overlooked in a case where the Government had solidly proven defendants' guilt. That was not true here. It is significant in this regard that Marc was only twenty one when he and Corsa took over Federal Coin; that the basic misrepresentation problems which later haunted him, were the handiwork of Lipton (and perhaps Weinstein), much older, wiser and sophisticated, who preceded him in the business; that Federal Coin did in fact supply most of its customers, including those testifying, with coins, and although opinions might differ on their ultimate value, that was because inevitably good faith opinions can differ on this subject;* that some customers might have been given a run-around to avoid giving refunds, with some

* Singer, from whom Federal Coin bought coins (2606) was defendant's witness and hurt them more than he helped them (2618-21, 2631-42, 2644-46, 2678). He therefore could be believed when he testified as an expert, that the grading methods Federal Coin used, were well known and accepted in the industry (2599); that grading in any event was "a very subjective thing" (2608); and that value opinions varied considerably (2614, 2683).

actually losing their investment after the SEC action, but this was not terribly much different from what happens elsewhere in business and therefore only remotely circumstantial at best of a scheme to defraud; that salesman Gordon might have puffed about Hartford but Marc had no control over that and indeed had fired salesmen when he learned that they were making unauthorized statements; and that the surest indication that we are right on all this is the testimony of Al Cito, the Government witness, who worked day in, day out with Marc for over nine months, and was thoroughly convinced that Marc was not attempting to defraud anyone.

These factors, then, made this a case where a jury could as likely say that the Government had failed to make the necessary convincing demonstration that this twenty one year old intended to defraud the public.* Given that, every error, even the slightest could make a difference, and the cumulative effect of the following did in fact make an enormous difference.

(1) The district court erred in failing to give the supplemental charge on intent requested by the jury, and in other aspects of its charge in general. The Sol Rauch and Corsa briefs have a full discussion of these points. We rely on their discussions.

(2) The district court erred in ruling on the Government's claims that the coins sold by Federal Coin were worth less than represented. Although the court sustained

* Corsa's Brief asserts that in fact the Government's evidence was insufficient. We agree with that.

objection when the first witness described the expert qualifications of a patient who commented adversely on his coins (51), it permitted the next witness to tell of an opinion that his coins were worth less than half what he paid (161), but with a limiting instruction that the opinion could be considered only for its "bearing upon [the doctor's] state of mind at the time that he took some subsequent action" (163). With the ground rules now set, a third witness said he received an appraisal that his coin was worth half what he paid (249), a fourth that his coins were said to be "overpriced" (643), and a fifth the same before the court could sustain objection (1085).

This testimony should not have been allowed, even with limiting instructions. The opinions themselves were hearsay, excluded by F.R.Evid. 802, and not saved by the exclusions or exceptions. They presented in addition statements of experts without qualifying them or fulfilling the other requirements of F.R.Evid. Rules 701-06. With the resultant prejudice so great, and the evidentiary value (bearing on the doctors' states of mind) so small, the evidence should have been excluded, F.R.Evid. 403, as the court understood with two other witnesses (764-65, 1085). In such a situation the limiting instruction was valueless. Compare Bruton v. United States, 391 U.S. 123 (1968).

The court's treatment of Stack compounded the problem. Stack was the crucial Government witness on grading (i.e., coin

condition) and value. The impact of his testimony was doubly strong because with Marc Rauch conducting the cross-examination, the jury had the two opposing "experts" face to face, without intervention of attorneys or interval between the Government's case and defendant's to assess which was right and which wrong.* The examination was especially delicate because Marc was cast in a difficult role even for the initiated, no less one without experience (1754) -- cross-examining a clever expert with long experience and devastatingly pronounced views. The situation, then, called for extreme care and tact from the district court, see United States v. Sacco, supra,** and indeed at the beginning the court was fair enough. At a certain point, however, it apparently settled that Stack not Marc, was right, and its words and actions conveyed this to the jury. It responded, "In the overall picture of this case, it seems to be a relatively minor point" (1743) when Marc showed that a Federal Coin statement which Stack attacked came from a major company catalogue (1741-42). It expressed satisfaction with Stack's answers when Marc cross-examined on his testimony that statements in the Federal Coin brochure were wrong (e.g. 1758). It sustained relevancy

* Although Corsa had the greater coin expertise, Marc as well was portrayed as one of Federal Coin's knowledgeable employees depicted in the blue brochure.

** The court pointed out to Marc (1832): "[The jury] tends to identify with the Court and if I am sustaining objections they think you are doing something wrong".

objections to questions about the American Numismatic Association, although these clearly went to Stack's testimony on direct (compare 1760-61 with 1519-20). It belittled Marc's points by taking over the questioning to minimize their impact (1762); sustained objection on the ground that Stack had not said a Federal Coin statement was misleading, when clearly he had (1763-64); refused to permit Marc to use a textbook statement contrary to Stack's testimony to challenge him on that testimony (1774-75); and refused to let Marc show that Stack's enormous ego accounted for whether he recognized a textbook authority or not (1777, 1802), although this plainly was proper cross-examination on credibility.

These actions implied that the Government's witness should be credited. They had no place in the case. United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971); United States v. Grunberger, 431 F.2d 1062, 1067-68 (2d Cir. 1970); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973).

(3) The district court erred in refusing to suppress Marc Rauch's grand jury testimony.* As the target of the investigation Marc had the right to refuse to testify altogether when he appeared before the grand jury on February 20, 1976. He did not exercise that right (or as the district court held, waived it) because of a promise that he could testify later. The Government broke that promise.

* Although Marc asked for dismissal of the indictment, at the very least he was entitled to suppress his testimony.

Where the question is the "intentional relinquishment or abandonment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458 (1938), giving up a right only because of a promise, later broken, is not a waiver. Compare Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347-48 (1963) (confession induced by promise is not voluntary); F.R.Crim.P. 11(d) (guilty plea induced by promise apart from plea agreement not voluntary). The result here is not different because the grand jury was involved (A 23).

(4) The district court erred in permitting the jury to consider on Marc's credibility the testimony of the two rebuttal witnesses who had not received coins. These two episodes were alleged similar acts of wrongdoing. They had not been charged, however, and had not resulted in a conviction. They could not therefore be proven by the Government on rebuttal to impeach credibility, United States v. Sposato, 446 F.2d 779, 780-81 (2d Cir. 1971) (acts of misconduct not admissible on rebuttal to impeach credibility unless they resulted in a conviction); United States v. Semensohn, 421 F.2d 1206, 1208 (2d Cir. 1971); United States v. Glasser, 443 F.2d 994 (2d Cir. 1971), and it was wrong to tell the jury that they could.

(5) The district court erred in its treatment of the amendment to the indictment through superseding information and in permitting the Assistant on summation to make erroneous

and unfair statements. These points are discussed in the Sol Rauch and Corsa Briefs.

CONCLUSION

The violation of the conflict of interest standards is clear. That violation compels reversal and a new trial, at which that and the other errors on this appeal are not permitted to recur. We rely in addition on any points raised by co-appellants to the extent applicable.

Respectfully submitted,

Donald E. Nawi, Esq.
Attorney for Appellant
Marc Rauch

2/3
UNITED STATES OF AMERICA v. MARC RAUCH, SOL RAUCH and
LAWRENCE CORSA - Docket No. 77-1311

I certify that on February 3, 1978 I mailed
a copy of the Brief for Appellant Marc Rauch to
David Trager, Esq., 225 Cadman Plaza East, Brooklyn,
New York 11201.

Donald E. Nawi
Donald E. Nawi

Dated: February 3, 1978